EMPORIUM JAYA (BENTONG) SDN BHD (IN LIQUIDATION)

v.

EMPORIUM JAYA (JERANTUT) SDN BHD (NO 2)

HIGH COURT MALAYA, TEMERLOH
RAMLY ALI J
[COMPANIES (WINDING-UP) NO: 28-4-2001]
12 MARCH 2002

COMPANY LAW: *Winding up - Petition - Application for oral evidence - Companies Act 1965, s. 221 - Affidavits - Cross examination of liquidator as deponent to affidavit - Whether there were bona fide grounds to support applications*

The petitioner presented a winding-up petition against the respondent which was signed by one Koh Kheng Min, ie, the liquidator. Three suppliers of goods and merchandise to the respondent, namely Then Shak Ling, Joo Huat Book Store and Joo Huat Stationary & Sport Trading (collectively known as "the applicants") applied to this court, *inter alia*, for leave to record the oral evidence on petition and to cross examine the said liquidator on his affidavits in support of the petition.

Held:

[1] Evidence by affidavits, similar to oral testimony in court during trial, is admissible. A person appearing as a witness to give oral evidence in court is subject to be cross-examined by the other party on his testimony during evidence in chief. The same principle should also apply to a deponent of an affidavit, ie, he is subject to be cross-examined on his depositions in the affidavit. (p 426 c)

[2] Being interested parties to the present winding-up proceeding, the applicants were entitled to know and to be satisfied that the petition filed by the petitioner was really supported by sufficient evidence. If the evidence by affidavit was insufficient to support the petition, then the applicants are entitled to apply to the court for oral evidence to be recorded and to cross examine the deponent of the affidavits in support, ie, the liquidator, who had initiated the present winding-up proceeding. (p 425 a-b)

[3] There were *bona fide* reasonable grounds to support the applications forwarded by the applicants. The said liquidator needed to appear before the court to be cross examined on his affidavits in order to assist the court

in ascertaining the truth and validity of the allegations of debts as alleged in the petition. The applicants had every reason to oppose the petition. Furthermore, the need for the said liquidator to be cross examined was fair and proper considering the fact that the applicants' solicitors received no reply to a letter they had sent to the petitioner's solicitors requesting for further and better particulars of the alleged debts in the said petition. (p 429 b)

[4] The said Koh was, at the relevant period, the liquidator for the petitioner and the provisional liquidator for the respondent company. Accordingly, he was under the control and supervision of the court under ss. 227 and 236(3) of the Companies Act 1965. Section 236(3) specifically provides that the exercise by the liquidator of the powers conferred on him shall be subject to the court's control, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any powers. (p 429 e)

[Applications partially allowed; costs to be paid from funds of respondent company.]

Case(s) referred to:

Emporium Jaya (Bentong) Sdn Bhd (In liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd [2002] 3 CLJ 10 ***(refd)***

Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd [1980] 1 MLJ 189 ***(refd)***

Liew Yin Yin Construction Sdn Bhd v. Yata Enterprise Sdn Bhd [1989] 3 MLJ 249 ***(refd)***

Re Smith & Fawcett Ltd [1942] 1 All ER 542 ***(foll)***

Syarikat Telekom Malaysia v. Business Chinese Directors Sdn Bhd [1996] 3 MLJ 692 ***(refd)***

Tan Sooi Shin v. Kow Kek Hing [1991] 3 CLJ 1895; [1991] 4 CLJ (Rep) 107 ***(refd)***

Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 ***(refd)***

Teck Yow Brothers Hand-Bag Trading Co v. Maharani Supermarket Sdn Bhd [1989] 1 CLJ 258; [1989] 2 CLJ (Rep) 555 ***(refd)***

Wee Chee Keong v. MBF Holdings Bhd & Anor [1995] 3 MLJ 549 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 217(1)(b), 218(1)(i), (e), 221(2)(c), (f), 222, 223, 224, 228(b), 229(1), 231, 236(3), (6), 237, 243, 277

Companies (Winding-Up) Rules 1972, r. 7(2)

Rules of the High Court 1980, O. 38 r. 2(3)

For the petitioner - KP Ng; M/s Ong Ban Chai & Co

For the applicants - Mogan Karupiah; M/s Mogan Karupiah

Reported by M Maheswaran

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JUDGMENT

Ramly Ali J:

These are applications by three applicants *vide* encls. 80, 83 and 86 for leave of the court for oral evidence to be recorded on the petition and to cross-examine the liquidator of the petitioner on his affidavits in support of the petition.

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Factual Background

On 17 August 2001, Emporium Jaya (Bentong) Sdn Bhd, (In Liquidation) ('the petitioner') presented a winding-up petition against Emporium Jaya (Jerantut) Sdn Bhd, ('the respondent') at Temerloh High Court *vide* Companies (Winding Up) Petition No: 28-4-2001. The said petition was signed by one Mr Koh Kheng Min, the liquidator of the petitioner. The petitioner prays that the respondent company be wound-up on the grounds that the respondent was unable to pay it's debt (s. 218(1)(e) of the Companies Act 1965) and it is just and equitable that the respondent be wound-up (s. 218(1)(i) of the same Act). The petitioner alleged that the respondent was indebted to the petition in the sum of RM18,133.68 being 'unpaid balance on goods sold and delivered and unpaid balance on services rendered and advanced.'

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On 2 July 2001, all the three applicants in the present applications, who at all material times, were suppliers of goods and merchandise to the respondent, had filed their respective civil actions in the Sessions Court Temerloh against the respondent after having discovered that the respondent company had been closed down and ceased business operations since May 2001. The applicants claimed that as at 30 May 2001, the respondent was indebted to them in the sums of:

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(i) RM79,932.21 - to the first applicant, Then Shak Liong;

(ii) RM40,705 - to the second applicant, Joo Huat Book Store Sdn Bhd,;

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(iii) RM48,042.33 - to the third applicant, Joo Huat Stationery & Sport Trading.

On 5 July 2001, each of the three applicants obtained an *ex parte* order of attachment before judgment against the property of the respondent. On 18 July 2001, Temerloh Session Court bailiff attached the movable properties and goods of the respondent company, at Jerantut, pursuant to the said order of attachment 5 July 2001. The court bailiff appointed public auctioneers and proceeded to proclaim the sale of the movable goods attached. The public auction was supposed to be held on 22 August 2001. On 17 August 2001, all the applicants obtained judgment in default of appearance against the

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respondent company in their respective civil actions against the respondent in Temerloh Session Court.

On the same day when the petition for winding-up was presented against the respondent by the petitioner (17 August 2001) the petitioner has also filed an *ex parte* summons-in-chambers (encl. 3) together with a certificate of urgency (encl. 3) praying for the following orders:

(i) that Mr Koh Kheng Min of M/s Koh & Associates, an approved liquidator, be appointed a provisional liquidator of the respondent company under s. 231 of the Act;

(ii) that the provisional liquidator is to take possession, control and protect the assets or realise the assets of the respondent company and such assets are not to be distributed or parted with until further order;

(iii) that the petitioner is to give the usual undertaking as to damages which the court may make if the court was of the opinion that the respondent company shall have sustained;

(iv) that the auction sale scheduled on 22 August 2001 or on such other date that may be fixed later against the assets of the respondent company be stayed pursuant to ss. 223 and 224 of the Act, and that the costs of the intended auction sale be paid by the provisional liquidator out of the respondent company's assets;

(v) that all further civil actions against the respondent company be stayed pursuant to s. 222 of the Act pending the hearing of the winding up petition;

(vi) that the costs of the application be taxed by the court and paid by the petitioner out of the assets of the respondent company; and

(vii) such further relief or order as the court deems fit.

The said summons-in-chambers was granted on 20 August 2001. The order was served on the court bailiff on 21 August 2001 and the public auction which was scheduled to be held on 22 August 2001 was cancelled.

All the applicants/judgment creditors being aggrieved and affected by the said *ex parte* order obtained by the petitioner, then filed their respective applications to set aside the said *ex parte* order *vide* summons-in-chambers encls. 14, 18 and 22 on the ground that the said *ex parte* order was a nullity on procedural grounds and therefore cannot be sustained on merit. The applicants' applications were dismissed with costs by this court on 28 September 2001.

(see: *Emporium Jaya (Bentong) Sdn Bhd, (In liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd* [2002] 3 CLJ 10).

The *ex parte* order which was granted by this court on 20 August 2001 was to stay until the disposal of the winding-up petition against the respondent.

On 31 October 2001, the petitioner filed list of parties intending to attend the hearing of the petitioner. All parties were ordered to submit their written submissions in respect of the petition and its objection. The petition was fixed for decision on 8 January 2002. In the mean time, on 3 January 2002, all the applicants filed their respective applications by way of summons-in-chambers for oral evidence to be taken on the petition as well as to cross-examine the said Koh Kheng Min regarding his affidavits in support of the petition. On 8 January 2002, the petition was adjourned pending hearing and determination of the applicants' applications.

These grounds of judgment are in respect of the said applications for leave of the court for oral evidence be recorded on the petition and to cross-examine the said Koh Kheng Min on his affidavits in support of the petition.

The Applicants' Applications

The three applicants filed their respective applications by way of summons-in-chambers *vide* encls. 80, 83 and 86, praying, *inter alia*, for the following orders:

(1) oral evidence be taken on the petition herein or on any matter relating thereto;

(2) Koh Kheng Min, the liquidator of Emporium Jaya (Bentong) Sdn Bhd (in liquidation), the petitioner herein, be directed to attend court to be cross-examined on his affidavit dated 16 August 2001. (encl. 4), the petition herein dated 17 August 2001 and on his affidavit verifying petition dated 21 August 2001 (encl. 11) and also on his affidavit in reply dated 12 September 2001 (encl. 28) and on all or any other papers, reports or documents connected with or related to the proceedings;

(3) such cross examination to take place before the hearing of the petition herein on a date and time to be fixed by the court;

(4) the hearing of and or the decision on the petition proper may be postponed and or be stayed until after the final disposal of prayers (1), (2) and (3) above;

(5) the said Koh Keong Min, as such provisional liquidator, be directed to produce, for inspection, by the applicant, his accountants or agents all

the books of account and papers of the respondent company in the hands of Koh Kheng Min, as the provisional liquidator herein, and the applicant, his accountant, or agent be at liberty to take phostostat copies thereof;

(6) Chong Ying Keong @ Chong Hock Yuen (NRIC No: 440706-10-5373), Wong Weng Chau (NRIC No: 390319-06-5145), Wong Lap Weng (NRIC No: 66051-5-06-5449) and Pan Chew Char (NRIC No: 520128-06-5161) the directors or former directors of the respondent company may be summoned to appear before the court to give information and or to produce books and papers relating to the respondent company in their custody concerning trade dealings, affairs or property of the respondent company;

(7) Chin Sin Wa a shareholder or former shareholder of the respondent company and Chin Kim Wah a shareholder or former shareholder of Emporium Jerantut (Kuala Lipis) Sdn Bhd, may be summoned to appear before the court to give information relating to the respondent company concerning trade dealings, affairs or property of the respondent company;

(8) the said Chong Ying Keong @ Chong Hock Yuen, Wong Weng Chau, Wong Lap Weng and Pan Chew Chan as such directors or former directors of the respondent company and the said Chin Sin Wa and Chin Kim Wah, may be examined on oath by word of mouth concerning trade dealings, affairs or property of the respondent company by the Court or the applicant;

(9) all proceedings herein be stayed pending the final disposal of the applicant/judgment creditor's application for leave to appeal to the Court of Appeal, and in the event such leave is granted then all proceedings herein be stayed pending the final disposal of the said appeal;

(10) *Alternatively*, the judgment sums and all interest accrued thereon and costs ordance with the default judgement dated 17 August 2001, be paid out by the said Koh Kheng Min to the applicant/judgment creditor herein from the assets and or funds of the respondent company;

(11) *In the further alternative*, all proceedings herein, including all proceedings to enforce and or give effect to the winding up order that may be made herein, in the event the court shall be of the opinion that the respondent company ought to be wound up and also the distribution of all the moveable assets and or the distribution of the proceeds of sale of the moveable properties of the respondent company herein, in the hands of the said Koh Kheng Min, as the provisional liquidator herein, be stayed until the final disposal of the applicant/judgment creditor's appeal to the Court of Appeal;

(12) such further or others, reliefs or directions as to this honourable court deems fit; and

(13) costs of this application be paid by the provisional liquidator to the applicant from the funds at the respondent company.

In my earlier decision in respect of the applicants' earlier applications to set aside the *ex parte* order granted in favour of the petitioner on 20 August 2001, where the said applications were dismissed with costs, I have ruled that all the applicants have definite interests in the outcome or the decision of the court in this proceeding. They have interest on the subject matter of the winding-up and in my view they have *locus standi* to oppose the petition as well as to apply to set aside the *ex parte* order obtained by the petitioner on 20 August 2001. (see: *Emporium Jaya (Bentong) Sdn Bhd (In Liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd* [2002] 3 CLJ 10). It is not dispute that if the winding-up petition against the respondent company is valid and successful, then the applicant's attempt to realise their respective debt from the respondent company would be hampered, and they would not have any priority in relation to the respondent's assets and properties. In *Teck Yow Brothers Hand-Bag Trading Co v. Maharani Supermarket Sdn Bhd* [1989] 1 CLJ 258; [1989] 2 CLJ (Rep) 555, Abu Mansor J, has also held that an objector who had an interest in the subject matter of the winding-up petition has *locus standi* in the proceeding.

In my earlier decision I have also ruled that being third party to the transacations the applicants were not in the position to raise any *bona fide* dispute as to the alleged debt owed by the respondent company to the petitioner, as they have no knowledge about the transactions that led to the creation of the alleged debt. As such I have ruled that the dispute raised by the applicants in the earlier applications aside the earlier *ex parte* order was not based on solid grounds. Such being the case, I have held that the petitioner qualifies to be 'creditor' for the purpose of of s. 217(1)(b) of the Companies Act 1965 and has the necessary *locus standi* to petition for winding-up of, the respondent company. However, I would like to emphasise here that the above findings do not in any way affect the applicant's right to call for oral evidence and to cross-examine the said Koh on his affidavits filed to support the petitioner, under the provisions of the law as applied under the present applications. To dispute the alleged debts and to call for oral evidence and to cross-examine the deponent of the affidavits in support of the petitions are totally two different things. They are not the same. Eventhough the applicants would not be in the position to raise any effective dispute as to the transactions that led to the creation of the alleged debt, it does not necessarily mean that they are not entitled to request for oral evidence to be taken and to cross-examine the deponent of the affidavit-in-support of the petitioner. Being

interested parties to the present winding-up proceeding, the applicants are entitled to know and to be satisfied that the petition filed by the petitioner is really supported by sufficient evidence. If the evidence by affidavit is insufficient to support the petition, then the applicants are entitled to apply to the court for oral evidence to be recorded and to cross-examine the deponent of the affidavits in support, in this case, the said Koh Kheng Min, the liquidator of the petitioner who has initiated the present winding-up proceeding. Therefore the question of *res judicata* raised by the petitioner's counsel in his submissions does not hold water and without merit.

The present applications are made under ss. 221, 236, 237, of the Companies Act 1965 and Rules 7 and 55 of the Companies (Winding-Up) Rules 1972 and also under the inherent powers of the court.

Under s. 221(1) of the Companies Act 1965, the court may, on hearing a winding-up petition, adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit. Section 221(2)(c) and (f) of the same Act empowers the court, on the petition coming on for hearing or at any time on the application of any person who has given notice that he intends to appear on the hearing of the petition, to direct that oral evidence be taken on the petition or any matter relating thereto; and to give such other directions as to the proceedings as it thinks fit. Apart from these provisions, O. 38 r. 2(3) of the Rules of the High Court 1980 (RHC 1980) enables the court to order attendance of the deponents of affidavits for their cross-examination on application of any party, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the court. Under r. 7(2) of the Companies (Winding-Up) Rules 1972, every application in chambers shall be made by summons in form 1 and the summons shall be served not less than two days before the day named in the summons, unless in any case it shall be otherwise ordered. The application may be made by any creditor and such application, must be made by summons supported by an affidavit and the liquidator shall also be served.

In *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24, the Privy Council had pointed out that in winding-up proceedings 'the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him unless some opposing party has applied for the attendance for cross-examination of the deponent and that application has been granted and the deponent does not attend.' The Privy Council, comprising Lord Bridge of Harwich, Lord Fraser of Tullybelton, Lord Templeman, Lord Griffiths and Lord Ackner, in reversing the decision of the petition Federal Court, further held:

> At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are creditably denied by the respondents' affidavit, then in the absence of oral evidence or cross-examination, the judge must ignore the dispute allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

This *dictum* has been followed in a number of decisions. (see: *Liew Yin Yin Construction Sdn Bhd v. Yata Enterprise Sdn Bhd* [1989] 3 MLJ 249; *Syarikat Telekom Malaysia v. Business Chinese Directors Sdn Bhd* [1996] 3 MLJ 692; and *Wee Chee Keong v. MBF Holdings Bhd & Anor* [1995] 3 MLJ 549). Evidence by affidavits, just like oral testimony in court during trial, is admissible. If a person appears as a witness to give oral testimony in court, he is subject to be cross-examined by the other party on what he says in examination-in-chief. The same principle should also apply to a deponent of an affidavit, ie, he is subject to be cross-examined on his depositions in the affidavit. In *Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd* [1980] 1 MLJ 189, Salleh Abas FCJ (as he then was) at p. 190 said:

> It is really a matter of common sense and an elementary legal principle that a party who swears an affidavit must be prepared to stand up to it by cross-examination unless the application to cross-examine him is without just cause, vexatious or motivated by desire to delay the proceedings (*Allen v. Allen* [1894] P 239.

However, it must be stressed here that to allow or not to allow any application to cross-examine a deponent upon his affidavit, is a matter of discretion based on judicial principles. (see: *Leisure & Allied Pte Ltd, v. Udaria Sdn Bhd, (supra)*. In another case: *Tan Sooi Shin v. Kow Kek Hing* [1991] 3 CLJ 1896; [1991] 4 CLJ (Rep) 107, VC George J held:

> As regards the question of cross-examination of witnesses and the adducing of oral evidence, this is not a writ action. It was a petition which was required to be supported by an affidavit or affidavits. Those opposing it may file affidavits in opposition and have them read at the hearing. Application may be made to have oral testimony adduced and for cross-examination of deponents of affidavits. Whether the Court will allow such application is entirely in the discretion of the Court.

In order to enable me to exercise my judicial discretion as regards the present applications made by the applicants in the present case, it is necessary for me to see how the proposed cross-examination would be relevant to the issue in the petition. An examination of this issue is therefore essential in order to enable me to determine whether the applications are made "without just cause, or motivated by desire to delay proceedings or without *bona fide* or sham or vexatious."

In the present case, the petition, to wind-up the respondent company was initiated by Mr Koh Kheng Min, the liquidator appointed on behalf of the petitioner. The petition was supported by the affidavits of- the said Koh Kheng Min dated 16 August 2001 (encl. 4); his affidavit verifying the petition dated 21 August 2001 (encl. 11) and also his affidavit in reply dated 12 September 2001 (encl. 28). The said Koh Kheng Min was also appointed provisional liquidator of the respondent company *vide* an order of this court made on 20 August 2001. In his affidavit in support of the petition, the said Koh Kheng Min alleged that while carrying out his job as liquidator of the petitioner, he discovered that the respondent company owed the petitioner in a sum of RM18,133.68 being "unpaid balance on goods sold and delivered and unpaid balance on services rendered and advances." To substantiate his allegation, he exhibited a copy of the balance sheet as at 30 November 2000 (but with the date deleted and changed to 31 May 2001 in pen) and two pages photostat copy of a purported general ledger. The proper audited statement of accounts of the respondent's company as well as other documents such as invoices or delivery notes which are commonly used in trade, have not been exhibited by the petitioner. The court must be satisfied and it is a duty of the petitioner to prove and establish the allegations of debts in the petition. The mere insolvency of the petitioner and the respondent company does not absolve the liquidator of the petitioner from his duty to satisfy the court by proper, valid, legal and admissible evidence and documents to prove and establish the allegations in the petition. In the circumstances, the original copy of the relevant statement of accounts as well as the general ledger book must be produced in court. In the present case, the respondent itself is not before the court. The respondent is not represented by anybody right from the beginning of the petition. The liquidator, of the petitioner is also the provisional liquidator of the respondent company. It is also not dispute that the director of the respondent company have absconded and would not be traced. The petitioner who is now in liquidation was would-up on 10 August 2001 *vide* Companies Winding-Up No: 28-3-2001 by Megah Supermarket and Departmental Store and the said Koh Kheng Min was appointed liquidator of the petitioner. On 17 August 2001 the said Koh Kheng Min as liquidator of the petitioner filed separate petitions *vide* Companies Winding-Up No: 28-4-2001, 28-5-2001 and 28-6-2001 to wind-up the Jerantut, Raub and Kuala Lipis outlet of Emporium Jaya for allegedly owing RM18,133.68; RM2,281,618.31 and RM1,976.40 respectively to the petitioner. Emporium Jaya chains are actually sister companies run by the same people and controlled by one man. Reliable records show that one Mr Chong Hock Yuen @ Chong Ying Keong who has been a director at all material times of the said Megah Supermarket and Departmental Store Sdn Bhd, (the petitioner in winding-up case no: 28-3-2001) was also the majority shareholder and has the controlling interest in all the other

Emporium Jaya chain in Bentong, Jerantut, Raub and Kuala Lipis. The applicants have been dealing with the Emporium Jaya Chains for about ten years and they have knowledge that all the Emporium Jaya chains were at all material times controlled and managed by one person ie, Mr Chong Ying Keong @ Chong Hock Yuen. The applicants have raised the issue of collusion between Megah Supermarket and Departmental Store Sdn Bhd, and the petitioner and also that there may be impropriety by the director or directors of the petitioner. The applicants believed that there may be attempts to defraud the creditors, especially the unsecured creditors. This belief was further strengthened when all the four outlets of Emporium Jaya chains in Bentong, Jerantut, Raub and Kuala Lipis have closed business since May 2001 and a notice to that effect was advertised in a Chinese Newspapers (Nanyang Siang Pau) on 17 May 2001. The petitioner also relied on a notice dated 31 July 2001 addressed to the board of directors of the respondent company about the alleged debts of RM18,133.68 owed by the respondent, being "unpaid balance on goods sold and delivered and unpaid balance on services rendered and advances" The notice was issued by the said Koh Kheng Min as liquidator of the petitioner. The notice also states that "any discrepancy in this statement must be reported in writing within ten days." There is no indication to show that the said notice was sent to the respondent company. There is no proof of posting and proof of acknowledgement of receipt by the respondent company. Further more, as I have stated earlier, the respondent company as well as the petitioner and the said Megah Supermarket and Departmental Store Sdn Bhd, were at all material times controlled and managed by one person ie, Mr Chong Hock Yuen @ Chong Ying Keong. Under the circumstances I am convinced that the applicants' applications to cross-examine the said Koh Kheng Min on his affidavit in support of the petition were not made without just cause or motivated by a desire to delay the proceeding or without *bona fide* or sham or vexatious. There are *bona fide* reasonable grounds to support the applications. The said Koh Kheng Min need to appear before the court to be cross-examined on his affidavits in order to assist the court to ascertain the truth and the validity of the allegations of debts as alleged in the petition. The respondent company was not before the court during the proceeding. It seems that they are not interested in contesting the petition. There may be some good reasons as why the respondent or its directors chosed not to object the petition. The applicants have every reason to oppose the petition. In the circumstances, the applicants have done what is expected to be done ie, to apply for the deponent of the affidavit in support of the petition to be cross-examined and to call for oral evidence to be taken. In this respect I am in full agreement with Lord Green MR in *Re Smith & Fawcett Ltd*, [1942] 1 All ER 542, when he said (at p. 545):

> If it is desired to charge a deponent with having given an account of his motives and his reasons which is not the true account, then the person on whom the burden of proof lies should, in my judgment, take the ordinary and obvious course of requiring the deponent to submit himself to cross-examination.

In the present case, I am satisfied that its is only fair and proper for the said Koh Kheng Min to be cross-examined on his affidavits in support of the petition in view of the fact that the applicants' solicitors had, on 21 December 2001 (before filing the present applications) sent a letter addressed to the petitioner's solicitor requesting for further and better particulars of the alleged debts in the said petition, but had received no response. The applicants' solicitors have also *vide* letter dated 9 November 2001, sent to the office of the official receiver Kuantan Pahang seeking clarification on the matters and the conduct of the said liquidator, but have not received any response. For the sake of justice and also for the interest of all the other unsecured creditors, the court has no other alternative than to grant leave to the applicants to cross-examine the said Koh Kheng Min on his affidavits in-support of the petition.

Furthermore, the said Koh Kheng Min, was, at all material times the liquidator for the petitioner and provisional liquidator for the respondent company. Being in that position, he is under the control and supervision of the court under s. 277 and s. 236(3) of the Companies Act 1965. Section 236(6) of the Companies Act 1965 specifically provides that the exercise by the liquidator of the powers conferred on him shall be subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers.

The petitioner's counsel argued that the applicants' applications, were filed at the eleventh hour ie, after all the parties have submitted their written submissions on the hearing of petition, and this urged the court to dismiss the applications. The counsel did not cite any authority to support this argument. I have considered the argument and found that it is without merit. The applications to call for oral evidence and to cross-examine the deponent of the affidavits were made under s. 221(2) of the Companies Act 1965. The said section provides that the power under the section can be invoked "at any time" on the application of the petitioner, the company or any person who has given notice that he intends to appear on the hearing of the petition. Of course, the application must be made and the order can only be made by the court before winding-up order is granted. So in present case, eventhough the applications were made at the "eleventh hour," the court can still entertain them because they were made before the granting of the winding-up order, against the respondent company.

The petitioner's counsel has also submitted that the applicants should have invoked s. 229 of the Companies Act 1965 before making the present applications to this court. The counsel submitted that the applicants should have gone to the official receiver for the purpose of making enquiry in relation to the matter in question. The counsel argued that under s. 229(1), the official receiver may make all the necessary enquiry relating to the conduct of a liquidator in performing his duties, if there is any complaint made by any creditor or contributory in regard thereto. The counsel further argued that, if there is any necessity to examine the liquidator or any other person on oath relating to the winding-up, the official reciever is the one who should make such application to the court under s. 229(2). The counsel also argued that under s. 228(b) of the same Act, the liquidator is bound to give the official reciever such information and such access to and facilities for inspecting the books and documents of the company, and generally such aid as may be requisite for enabling the official receiver to perform his duties.

With respect, I am not able to agree with the counsel's submission relating to the application s. 228(b) and s. 229 of the Companies Act 1965 to the present case. I am of the view that both ss. 228 and 229 are not applicable to the present case. Both the sections are only applicable in winding-up cases where a person other than the official reciever has been appointed as liquidator by the court. In other words, both the sections are only applicable after liquidator has been appointed by the court, but not before. In a winding-up proceeding, liquidator is appointed by the court at the time when a winding-up order is granted against the company. Both the sections clearly say that they apply to cases "where in the winding-up of a company by the court a person other than the official reciever is appointed liquidator." They do not apply to cases where provisional liquidator was appointed under s. 231 of the same Act. A provisional liquidator is appointed after the presentation of a winding-up petition and before the making of a winding-up order.

In the present case, all the applicants are creditors to the respondent company. They are not creditors to the petitioner company. Their interest in the proceeding only relates to the respondent company. As for as the respondent company is concerned, winding-up order has not yet been made by the court and no liquidator has been appointed. The said Koh Kheng Min, was only appointed as a provisional liquidator under s. 231 of the Companies Act 1965. Therefore, the applicants in the present case cannot, in law, invoke s. 228 and s. 229 in order to help them. Under the circumstances, the only proper and appropriate action to be taken by the applicants in the present case is to make the present applications under s. 221(2) of the Companies Act 1965. In fact, in the present case, the solicitors for the applicants had, before filing the

present applications in court, written to the petitioner's solicitor on 21 December 2001, requesting for further and better particulars of the alleged debts, but failed to get any response. The solicitors for the applicants had also written to the office of the official assignee in Kuantan on 9 November 2001, seeking clarification on the matters and the conduct of the said liquidator, Koh Kheng Min. Again, the applicants failed to get any response from the official assignee. The petition was fixed to be heard in court on 8 January 2002. The applicants have filed in their notices of intention to oppose the petition.

Therefore, the applicants have no other alternative, but to make the present applications in court.

Decision

I have stated earlier that there are sufficient justification to order the said Koh Kheng Min to be cross-examined on his affidavits in support of the petition and that oral evidence be taken from him on the petition and any matter relating thereto. Therefore, I am now making an order that prayer (1), (2), (3) and (5) as per the summons-in-chambers (encl. 86) be granted. Prayer (4) is also necessary and therefore granted ie, the hearing of and or the decision on the petition proper is postponed and be stayed until after the final disposal of prayers (1), (2), (3) and (5).

With regards to prayers (6), (7) and (8), I am not prepared to grant them at this stage, because, as has been told in the affidavits that all the shareholders or former shareholders as well as the directors or former directors of the respondent company have absconded and could not be traced. To compel them to give oral evidence in court may not be practical. The applicants may not be able to trace them and to serve the necessary order on them.

The process of tracing them may be time consuming. It may take years or may be they could not be traced at all. It would be unfair to the petitioner if the petition proper has to be postponed and stayed indefinitely until all of them can be traced and give oral evidence in court. It is also not in the interest of the applicants and other creditors to the proceeding. Therefore, I am not making any order in respect of prayers (6), (7) and (8).

Prayers (9), (10) and (11) are actually made "in the alternative". Again, I am not prepared to grant those prayers at this stage of the proceeding. What is necessary at the present stage is an order granting prayer (4) ie, the hearing of and the decision on the petition proper be postponed and be stayed until after the final disposal of prayers (1), (2), (3) and (5). Section 221(1) of the Companies Act 1965 enables the court, on hearing a winding-up petition, to

adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit. Furthermore, s. 221(2)(f) of the same Act also enables the court to give such directions as to the proceedings as it thinks fit.

I am of the opinion that prayers (9), (10) and (11) are not appropriate to be granted at this stage of the proceeding. Further more, the applicants' counsel has not submitted on the necessity of prayers (9), (10) and (11). Therefore, I am not making any order in respect of those three prayers at this stage of the proceeding. The applicants can still apply for appropriate order under s. 243 of the Companies Act 1965, at any appropriate time after an order for winding-up has been made and the court, on proof to its satisfaction, may make any order staying the proceedings either altogether or for a limited time on such terms and conditions as it thinks fit.

Lastly, I am also making an order that costs of these applications be paid from the funds of the respondent company as prayed in prayer (13).